PUBLIC PROSECUTOR

v.

YAP THIANG WAH

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CRIMINAL APPEAL NO. 47-7-1991]
26 OCTOBER 1991

CRIMINAL PROCEDURE: *Magistrates notes of proceedings - Legality of custody - Whether improper and illegal - Propriety of the alterations made by the learned Magistrate challenged by the Defence well before the closure of the prosecution case - Failure of the prosecution to call the Magistrate concerned to explain alterations - Undisputed alterations to the commencement of the date of prison sentence and four warrants of commitment - Issue of fact - Whether accused being in lawful custody at the material time of commission of the offence - Criminal Procedure Code, s. 278.*

The accused was charged under s. 3 Fire Arms Act (Increased Penalties Act) 1977.

First ingredient in the charge was proven but the Prosecution failed to prove the second and third ingredients. That is whether the accused had the intention to cause death or grevious hurt, and also that the accused was actually in lawful custody at the time of incident.

The net result of the accused's testimony (if accepted) was that he was in unlawful custody at the time of the escape and that when the shot was fired he did not have the intention to kill or cause hurt to anyone.

The issue before the Court was whether the custody of the accused was at the material time of escape a lawful one and as a question of fact, the burden of proving this was placed on the Prosecution.

Held:

[1] If the alterations had been made by the learned Magistrate after she had pronounced that the sentence of imprisonment in each case was to run from the date of arrest her subsequent amendment of that date would have been improper and illegal contrary to s. 278 of the Criminal Procedure Code.

[2] It would appear from the record that the Magistrate made the endorsement re-stating the sentence after she had pronounced sentence on him and signed notes of proceedings and this she had no power to do.

[Accused found guilty of an offence under s. 33 of the Arms Act 1960 and convicted and sentenced.]

Cases referred to:
PP v. Heng You Nang [1949] 15 MLJ 285 ***(foll)***
Wong Sieng Ping v. PP [1967] 1 MLJ 56 ***(cons)***

Legislation referred to:
Arms Act 1960, s. 33
Evidence Act 1950, s. 103
Firearms (Increased Penalties) Act 1971, s. 3

For the public prosecutor - Seah Hock Thean
For the accused - S. Gunasegaran; M/s Guna & Co.

JUDGMENT

LC Vohrah J:

The accused was charged as follows:

> Bahawa kamu Yap Thiang Wah k/p: 6161247(B) pada 12 Julai 1987 jam lebih, kurang 4.00 petang, di dalam Hospital Sultanah Aminah, Johor Bahru, di dalam Daerah Johor Bahru, di dalam Negeri Johor didapati telah merampas sepucuk pistol .38 Special kepunyaan Pegawai Penjara Ahmad bin Aziz k/p: 6872779 dan didapati kamu telah melepaskan satu das tembakan ke arah beliau yang boleh mendatangkan kematian atau cedera parah dengan tujuan melarikan diri dari tahanan, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 3 Akta Senjatapi (Penalti Lebih Berat) 1971.

The facts of the prosecution's case can be briefly stated. Whilst prison warden Ahmad bin Aziz (PW5) was guarding the accused at about 4 p.m. on 12 July 1987, in a ward in Hospital Sultanah Aminah, Johor Bahru, the accused asked to go to the toilet in order to pass motion. PW5 then accompanied him to the toilet. When the accused came out of the toilet he rushed at PW5 with a knife which he had earlier acquired from a fellow patient (PW7) in the ward. A struggle ensued during which PW5 received a cut in his left hand. In the same struggle PW5's service revolver (P2) came out of its holder (P8) and hung from the lanyard (P10) looped round his right shoulder and his bullet pouch (P3A) fell off his belt (P9). With one stroke of the knife the accused cut through the lower end of the lanyard whereby the revolver fell on to the floor. The accused grabbed it and also the bullet pouch with his handcuffed hands and ran into the ward with PW5 close on his heels. The accused first ran to the staff counter in the ward where he pointed the revolver at PW5 and then fled the ward through the main entrance doorway. When he reached the open area near the lift and the exit staircase, PW5 was outside the main entrance doorway about 50 feet away. At that point of time the accused fired a shot in his direction. The bullet hit the wall beside the doorway. The accused then escaped and was arrested on 29 September 1989, by Constable Zulkifli bin Shariff (PW11) at a police road block at Rantau Panjang, Kelantan, whilst he was travelling in a taxicab. At the time of his arrest he was found in possession of P2 together with the bullets P3a-i. P2 and P3a-i were subsequently sent for examination to the armaments officer Mohd. Saufi bin Iman Din (PW1) who tested them and found them to be in good serviceable condition.

At the end of the prosecution case Counsel for accused, whilst conceding that the prosecution had established the first ingredient in the charge, namely discharging a shot in the direction of PW4, contended that it had failed to prove the second and third ingredients, namely that the accused had the intention to cause death or grievious hurt to PW5 and that the accused was actually in lawful custody at the time of the incident. Counsel argued that the prosecution had failed to establish the necessary intention because the evidence of PW5 on which it relied for proof of this ingredient showed inherent contradictions and also some element of fabrication when it was compared with that of the eye witness PW7 who was a contemporary patient in the ward. Further even if PW5's evidence were to believed in toto, he argued, the necessary intention had been dispelled by the fact that the accused had had two separate opportunities to shoot PW5 and did not do so. In any event, he argued, no expert evidence had been furnished to show that the marks on the wall beside the entrance doorway near which, PW5 stated, he was shot at were actually bullet marks. As to the accused having been in lawful custody at the material time, Counsel argued that since the four warrants of committal P12, D13, D14 and D15 together with the charge sheets D16A-D clearly showed that the date of commencement of the sentence of one year's imprisonment had been altered from 12 January 1986, the date of the accused's arrest in respect of four offences with which

he had been charged, to 27 December 1986, the date of the sentence, and as the evidence of the Prison Records Officer PW8 indicated that with remission the accused should have been released on 11 September 1986, had the sentence commenced on 12 January 1986, the Magistrate concerned should have been called to clarify the effective commencement date of the sentence. Having regard to the fact that there was no dispute that the accused did fire the revolver P2 and to the photographs P7j and P.7k showing indentations in the wall beside the doorway where PW5 had stood and also to the evidence of PW8 to the effect that the warrants of commitment showing the altered commencement date of sentence had been duly initialled thus indicating that the accused would have been in lawful custody as a result of a proper order of the Court on the day of the incident, I was satisfied that a *prima facie* case had been made out against the accused on the charge and therefore called on him to enter upon his defence.

The accused aged 31 years elected to give his evidence on oath. In the light of the nature of his defence the testimony of the accused has to be stated in some detail as follows. He was arrested in Taman Pelangi on 12 January 1986 and charged in the Magistrate's Court, Johor Bahru on 24 January 1986, for four separate offences of armed robbery. He was then remanded until 20 December 1986, when he appeared before the Magistrate and pleaded guilty to all four charges. On 27 December 1986, the Magistrate, after hearing his plea in mitigation, passed sentence of one year's imprisonment and one stroke on him with effect from the date of his arrest in respect of each of the four charges, the sentences to run concurrently. The pronouncement of sentence in Bahasa which he understood was also translated to him by a Chinese lady interpreter who confirmed to him that the sentence of imprisonment was to run from the date of arrest. Half an hour later he was taken to the Johor Bahru Prison where he was met by a prison officer who asked him what the length of his sentence was. He replied that he had received a sentence of 1 year and 1 stroke for each offence. The officer examined the warrants and then took him to the office where the prison officer remarked that his term of imprisonment would have expired leaving only the order of 4 strokes to be carried out. The officer added that because his term had expired he had to bring him to see his senior officer. He was then taken to see the senior officer by the name of Chia who after checking the warrants of commitment also asked him how long his term of imprisonment was. He replied that it was one year with one stroke on each charge with effect from the date of his arrest. Chia then did some calculation and remarked that he had already served 10 to 11 months of imprisonment from the date of his arrest and accordingly his term of imprisonment had expired leaving only the sentence of 4 strokes to be carried out. Chia then asked him if he wished to appeal against the sentence. He said no. Chia then stated that the sentence of 4 strokes had to be carried out before he could be released. Chia then summoned a Corporal and showed him the 4 warrants of commitment. The Corporal also remarked that the sentences of imprisonment had expired leaving only the sentences relating to whipping to be carried out and commented on the leniency of the punishment. Chia then attempted to telephone the Court to enquire about the sentences whereupon he raised an objection on the ground that sentence had already been passed. On seeing that he was annoyed Chia mentioned that he was only going to enquire about the number of strokes to be inflicted and then directed somebody to take him away. He was then taken downstairs and 5 to 6 minutes later an officer came to him with the 4 warrants of commitment and informed him that his sentences of imprisonment were to run from the date of the pronouncement of the sentences and not from the date of arrest. He protested but was taken to his cell. He was never brought back to the Magistrate who had passed the sentences on him. He subsequently received the 4 strokes. He came to be in Hospital Sultanah Aminah because he had deliberately swallowed 6 nails and half a razor blade because he wanted to be taken out of the prison as he had

been assaulted by the inmates and a warder. At that time he had only over a month of his amended sentences of imprisonment to undergo before release and wished to spend the remaining period in the hospital. However during the period of 4 days he was in the hospital nothing was done by the doctors to surgically remove the items he had swallowed and that too despite his having further swallowed two safety pins whilst he was there. He then formed the intention to escape. On the day in question after the change of shift duty of the warders at 2 p.m. he obtained PW5's permission to go to the toilet. He was handcuffed and was accompanied by PW5 to the toilet. PW5 waited outside when he went in. After 2 or 3 minutes he came out of the toilet with a knife and found PW5 waiting outside with his back towards him. He went up to PW5 and tapped his shoulder. When PW5 turned around and saw him with the knife PW5 asked him what he was going to do with it. He replied that PW5 should know what he was doing. PW5 panicked and retreated to the staircase where a scuffle took place resulting in the two of them reaching the landing at the bottom of the stairs. In this scuffle PW5's revolver and bullets fell on to the floor and he immediately grabbed the revolver. This made PW5 plead with him not to shoot and PW5 told him he could run away as long as he was not harmed. He then rebuked PW5 and intimated he only wanted the key to the handcuffs whereupon PW5 produced the key from his trouser pocket and threw it on to the floor but it slipped out of the locked iron exit door at the bottom of the staircase. He then ran up the staircase into the ward and straight through it and out of the entrance doorway. He never stopped and only looked back to see if anyone was pursuing him but found no one doing so. Whilst he was fleeing in the narrow corridor outside the entrance doorway he turned around and fired a shot into the air in the direction of the doorway. He did not intend to shoot at anybody as he was not aware of the presence of any person at that time. The shot went off unintentionally.

The net result of the accused's testimony, if accepted, was that he was in unlawful custody at the time of the escape and that when the shot was fired he did not have the intention to kill or cause hurt to anyone. The Registrar of the Sessions Court, Johor Bahru (DW2), called as a witness for the defence, confirmed from the original charge sheets (D21A-D) that the Magistrate who convicted and sentenced the accused on all the four charges on 27 December 1986, had in fact altered the date of commencement of the prison sentence in her notes of proceedings which were transcribed in blue ink from "dari tarikh tangkap" to "mulai hari ini", the later endorsement being in black ink. He also confirmed that there was an additional endorsement in black ink at the end of her notes of proceedings re-stating that the sentence in respect of the four offences was to take effect from 27 December 1986. DW2 additionally confirmed that in the warrants of commitment in respect of the four charges the date of commencement of the prison sentence (P12 and D13-15) had also been altered from "12 January1986" to "27 December1986". He explained that these warrants would have had to be prepared by the interpreter in charge of the Court after the Court had risen for the day or in between breaks during a hearing.

I gave careful consideration to the undisputed evidence relating to the alterations made to the commencement date of the prison sentence in the light of the accused's account of what transpired in the prison soon after his arrival and to the failure of the prosecution to call the Magistrate concerned to explain the alterations in her notes of proceedings even though the propriety of the alterations had been challenged by the defence well before the close of the prosecution case. In my view, if the alterations had been made by the learned Magistrate after she had pronounced that the sentence of imprisonment in each case was to run from the date of arrest, her subsequent amendment of that date would have been improper and illegal as it was contrary to s. 278 of the Criminal Procedure Code which reads:

> No Court, other than a High Court, having once recorded its judgment, shall alter or review the same: provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at anytime before the Court rises for the day.

The alteration of the commencement date could certainly not have been considered a rectification of a clerical error which may be made at any time. There was no proof that the rectification made by the Magistrate of this non-clerical mistake was made before the Court rose for the day or at the time sentence was passed and in the presence of the accused. It would appear from the record that the Magistrate made the endorsement re-stating the sentence after she had pronounced sentence on him and signed her notes of proceedings and this she had no power to do. As was stated by Spenser-Wilkinson J in *PP v. Heng You Nan* [1949] 15 MLJ 285 (at 288):

> If a written judgment is delivered it is perfected as soon as it is delivered and signed; if an oral judgment is delivered it is perfected, in my opinion, as soon as it has been pronounced and the effect thereof has been entered in the Judge's note-book and signed.

I did not think, contrary to what the learned Deputy Public Prosecutor had submitted, that there was an obligation on the part of the defence under s. 103 of the Evidence Act 1950 to call the Senior Warder Chia to corroborate the accused's story that the alteration of the date of commencement of the prison sentence was made after the accused had been despatched to the prison. It is a well settled principle of our criminal jurisprudence that it is for the prosecution to prove every essential ingredient in a charge. If any authority is required one need only refer to *Wong Siew Ping v. Public Prosecutor* [1967] 1 MLJ 56, where Lee Hun Hoe J explained the principle in great detail. The prosecution in this case had to prove all the three essential ingredients of the present charge of which the fact of his being in lawful custody at the time of the incident was one. In the light of the explanation given by the accused and the evidence of DW2 I entertained grave doubts as to whether the accused was in lawful custody because of the undisputed alterations to the commencement date of the prison sentence in respect of all the four charges in both the Magistrate's notes of proceedings and the four warrants of commitment, and, accordingly, I was of the view that the accused could not be found guilty of the charge under s. 3 of the Firearms (Increased Penalties) Act 1971, although the other two essential ingredients had been proved. However, on the facts that had been established beyond reasonable doubt by the prosecution that he shot at PW5 and later brandished the revolver to force the taxi driver to drive him away from the scene, I had no doubt that the accused was guilty of the offence under s. 33 of the Arms Act 1960 and I so find him and convicted him on that charge. I sentenced him to 4 years' imprisonment with effect from the date of conviction and to 4 strokes.

Also found at [1992] 1 CLJ 495